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STATUTE:

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

NOS. 110 AND 111

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.,
Petitioners

v.

NATIONAL LABOR RELATIONS BOARD

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

NATIONAL WOODWORK MANUFACTURERS ASSOCIATION, ET AL.

ON WRITS OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE SEVENTH CIRCUIT

BRIEF FOR THE AMERICAN FEDERATION OF LABOR AND CONGRESS OF INDUSTRIAL ORGANIZATIONS AS AMICUS CURIAE

INTEREST OF THE AFL-CIO

This brief *amicus curiae* is filed by the American Federation of Labor and Congress of Industrial Organizations (AFL-CIO) with the consent of the parties, as provided for in Rule 42 of the Rules of this Court.

The AFL-CIO is a federation of one hundred and twenty-nine national and international unions representing approximately thirteen million working men and women. The questions of the function of collective bargaining in the resolution of work assignment problems, and of the limitations, if any, on the use of economic weapons to enforce the lawful agreements that are the fruit of such bargaining are thus naturally of great importance to the AFL-CIO. The AFL-CIO therefore is directly interested in presenting to the Court its views on these matters.

ARGUMENT

1. In No. 110 National Woodwork challenges the National Labor Relations Board's conclusion (R. 24-27, 30 n. 21)[1] that a work stoppage against Frouge Corporation by the Union[2] carpenters it employed to prevent Frouge from violating a lawful work preservation clause in their collective bargaining agreement did not violate Section 8(b)(4)(B) of the National Labor Relations Act as amended (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 *et seq.*), the secondary boycott section. We believe that the result reached by the Board in this aspect of the case is correct.[3] Moreover, since it is necessarily premised on the Board's view that clauses such as Rule 17 here (R. 10, 24-27), which guaranteed unit employees the right to cut out blank doors and fit them for hardware, are primary and thus outside the reach of Section 8(e), we wish to note at this

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[1] R. refers to the printed record prepared for this Court.

[2] Metropolitan District Council of Philadelphia and Vicinity of the United Brotherhood of Carpenters and Joiners of America, AFL-CIO.

[3] Before the Board and in the lower court, three other related work stoppages, the so-called Nason-Cullen, McDonnell, and Driscoll incidents, were litigated and violations of Section 8(b)(4)(B) were found in each one (R. 12-16, 28-30). They are not directly involved in this proceeding, however.

point that we agree with that conclusion of the Board and with its rationale as set out at length in its Brief in No. 111.[4] However, we believe that the method the Board employed in deciding the Section 8(b)(4)(B) issue here is unsound in one respect. For the Board's decision indicates (R. 28-30) that it has set down a rigid rule—its so-called right-to-control doctrine—that employees can never strike against their own employer about a matter over which he lacks the legal power to grant their demand. The rule, by its nature, requires the Board in every Section 8(b)(4)(B) case of the type represented by the Frouge incident to make a preliminary inquiry into the struck employer's legal relations with others. Only after finding that he has control does the Board evaluate other aspects of the case. This is the procedure it followed in deciding the Frouge incident (*ibid*).[5] The following is an attempt to show that this rule of law is incorrect and to set out an analysis that is more responsive to the nature of the problem.

Read literally, Section 8(b)(4)(B) would prohibit all inducements of employees and coercion of employers designed to bring about a cessation of business relations. So read, the Act would prohibit most primary strike activities since the union's desire, even in the typical lawful strike, is to bring about a closing of the struck employer's operations, thereby inevitably putting pressure on other employers to change or modify their way of doing business in a manner

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[4] The Board's brief completely refutes National Woodwork's contention (Pet. 7-21) that every refusal to handle goods is secondary. Therefore, in order not to burden this Court unnecessarily, we will not repeat the arguments made there.

[5] If the inquiry does not show a violation, the Board follows a procedure perfectly compatible with what we regard as proper principles. Thus we submit that it is clear that its conclusion that the Union's only object was to put legal primary pressure on Frouge, its employer, and that the resulting pressure on Baldwin Lumber Co. and Mohawk Flush Doors, Inc. was an incidental consequence, is correct and should be affirmed.

which may effect the settlement of the primary dispute. It is well-settled, however, that this provision is not to be read literally. It must be interpreted so as to accommodate the dual congressional objectives of allowing union pressures against employers with whom it has a dispute—despite any consequent cessation of business with neutrals—and shielding neutral employers from direct pressures—despite the fact that such neutrals are doing business with the employer having the dispute. *Local 761, Electrical Workers v. N.L.R.B.*, 366 U.S. 667, 672 (1961); *Seafarers International Union v. N.L.R.B.*, 265 F.2d 585, 591 (D.C. Cir., 1959). As the Fifth Circuit noted recently, the inquiry must be guided by the recognition that:

> "an illegal object is something more than a result, even an inevitable result of a work stoppage for a legitimate reason. . . . The distinction to be drawn as best as one can is between an object and a consequence." *Houston Insulation Contractors Association v. N.L.R.B.*, 357 F.2d 182, 187 (5th Cir., 1966) petitions for certiorari pending Nos. 206 and 413, this term.

We are mindful of and intend to stress the validity of the point that "no rigid rule which would make . . . [a] few factors conclusive is contained in or deducible from the statute," *Sales Drivers v. N.L.R.B.*, 229 F.2d 514, 517 (D.C. Cir., 1955); yet we believe that there are two guidelines by which the validity of the Board's right-to-control doctrine may be evaluated.

First, the whole thrust of the Act, especially through Sections 8(a)(5), 8(d), and 9, is to center disputes arising out of disagreements as to wages, hours, terms, and conditions of employment in the bargaining unit covering the two contending parties concerned. Cf. *United Mine Workers v. Pennington*, 381 U.S. 657, 665-667 (1965). As to these disputes, the parties have an all but unfettered right to use the economic weapons of their choice and the Board a correspondingly limited role to play in assessing the legality of their actions. See *N.L.R.B. v. Insurance Agents' International Union*, 361 U.S. 477, 497-498 (1960); *Ameri-*

can Ship Building Co. v. N.L.R.B., 380 U.S. 300, 317 (1965). Thus in determining the legality of activity under Section 8(b)(4)(B), the Board must be careful not to evolve rules which result either in the complete suppression of normal economic activity or in shifting it to a locus other than the one contemplated by the overall structure of the statute. Cf. *Local 761, Electrical Workers v. N.L.R.B., supra*, 366 U.S. at 672. For as Senator Taft noted in explaining the purpose of this section:

> "There is no reason that I can see why we should make it lawful for persons to incite workers to strike when they are perfectly satisfied with their conditions. *If their conditions are not satisfactory, then it is perfectly lawful to encourage them to strike.*" Remarks of Senator Taft, 93 Congressional Record 4323. (Emphasis added.)

Clearly then the proper course is to recognize that activity, which on its face grows out of such a dispute, in and of itself carries with it no indicia of an illegal secondary intent and is thus presumptively outside the scope of Section 8(b)(4)(B).

Second, in cases where this presumption is applicable, the Board's General Counsel must overcome it by establishing that "the nature of the [union's] acts shows [an illegal] intent." *Seafarers International Union v. N.L.R.B., supra*, 265 F.2d, at 591. It is not enough for the Board to substitute:

> "inferences as to the lawfulness or unlawfulness of an objective, based purely on its own judgment as to the propriety of the means employed in a labor dispute, for the sole statutory test of unlawfulness is the end or objective sought . . ." *N.L.R.B. v. General Drivers*, 225 F.2d 205, 209 (5th Cir., 1955).

Thus an otherwise primary strike cannot be invalidated under Section 8(b)(4)(B) because the Board believes it is unfair under the circumstances for the union to use economic force; it is secondary activity only if the union's acts or statements other than the strike itself, or the threat to strike, show a secondary intent.

The errors the Board fell into because it failed to follow either of these guidelines in evolving its right-to-control doctrine can be easily illustrated by looking at the method by which it determined whether or not the four work stoppages here, all on their face in protest of breaches of contract, were interdicted by Section 8(b)(4)(B).[6] It reached the conclusion that a violation had occurred in three of the cases on the *ipse dixit*, unsupported by any analysis of the evidence, that the "effect which [the strike] *was designed to produce* was to force or require [another employer] to reassign the disputed work to [the struck employer]" (R. 28). (Emphasis added.) See also, e.g., *Ohio Valley Carpenters District Council (Cardinal Industries, Inc.)*, 144 NLRB 91, enforced, 339 F.2d 142 (6th Cir., 1964); *Local 5, United Association (Arthur Venneri Co.)*, 137 NLRB 828, enforced, 321 F.2d 366 (D.C. Cir., 1963); *I.L.A. Local 1694, (Board of Harbor Commissioners)*, 137 NLRB 1178, enforced, 331 F.2d 712 (3rd Cir., 1964).

This reasoning, we submit, simply will not do. First, it completely overlooks the point that in this case the Union's action did not carry with it any inherent indicia of secondary motivation. Indeed this is a situation where the strike is presumptively primary. For this Court's decision in *Fibreboard Paper Products Corp. v. N.L.R.B.*, 379 U.S. 203 (1964) reaffirms the proposition that disputes between an employer and his employees over whether the employer should guarantee the latter the right to perform in the future certain "work previously performed by employees in the bargaining unit, which the employees were capable of continuing to perform" (*ibid.*, at 210)

[6] In its opinions invoking this doctrine, the Board poses the problem as one where it must decide whether the struck employer is the primary or secondary. But these are simply conclusory terms which describe the end of the analysis, since it is the union's object which determines whether the struck employer is to be considered a primary or a secondary.

is a dispute over terms and conditions of employment. See also *Teamsters Union v. Oliver*, 358 U.S. 283 (1959); *Order of Railroad Telegraphers v. Chicago & North Western R. Co.*, 362 U.S. 330 (1960). Such disputes are thus within the area marked out by the Act for resolution by economic warfare if either party feels such a course of action is necessary to protect its interests. It does, and we believe it must, follow that union economic action to protest the breach of a clause which settled that dispute and which is outside the reach of Section 8(e) of the Act is also primary. As Judge Skelly Wright noted in *Orange Belt District Council of Painters v. N.L.R.B.*, 328 F.2d 534, 537-538 (D.C. Cir., 1964):

> "Primary subcontracting clauses . . . fall outside the ambit of Section 8(e) . . . [Thus] economic enforcement thereof is not proscribed in Section 8(b) (4) (B) since they are not directed at involving neutral employers in a labor dispute *'not their own.'* " (Emphasis added.)[1]

Local 1976, United Brotherhood of Carpenters v. N.L.R.B., 357 U.S. 93 (1958) is not to the contrary. It merely held that a contract clause which is concerned with matters relating to disputes over the terms and conditions of employees of other employers, while legal in itself (at that time), does not excuse conduct against the signatory which in the absence of that clause otherwise "would unquestionably be

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[1] In *N.L.R.B. v. Denver Building and Construction Trades Council*, 341 U.S. 675 (1951), it was found that the union's *object* in striking its employer was to cause him to stop doing business with another because the latter was non-union—that is, because of a matter concerning the terms and conditions of the latter's employees. A clause in a contract requiring an employer not to do business with another if the latter is non-union would by the same token be unlawful under Section 8(e) unless its proviso was applicable, and for this reason the use of economic pressure to enforce it would also clearly violate the Act. Thus it is clear that *Denver Building Trades* is perfectly consistent with our position that a clause which has been found lawful under Section 8(e), because it is concerned with the terms and conditions of the employees whom the contract covers, must be enforceable by economic action.

a violation" of Section 8(b)(4) (*ibid.*, at 101). The Court expressly declined to consider the threshold question of whether or not the activity undertaken by the unions there violated that Section (*ibid.*, at 96 n. 1). Thus the decision does not speak to the question of how the Board is to determine the legality under Section 8(b)(4)(B) of a strike by employees against their own employer to protest a breach of a contract clause which governs their own terms and conditions of employment. That is the question here.

Second, as we have shown, p. 5, *supra*, the Board, to invalidate under Section 8(b) (4) (B) economic action, or the threat of economic action, that is primary on its face, must prove secondary intent on the basis of acts other than the strike, or the threat to strike, itself. The Board's right-to-control doctrine does not respect this limitation. It infers from the fact that a strike by employees to protest the failure of their employer to abide by a work preservation clause in their contract produced pressure on employers other than the struck employer that the union's object was to create such pressure. This is clearly impermissible, for it is well-settled that "an illegal object is something more than a result, even an inevitable result . . ." *Houston Insulation Contractors Association v. N.L.R.B.*, *supra*, 357 F.2d, at 187. It is also illogical since it fails to give due regard to the fact that the union's basic announced aim is to protest the fact that the employer had placed himself in a position which forced him to breach his pre-existing union contract. His decision to do so has had a serious adverse effect on his employees and carries with it implications which go to the basic structure of his entire relationship with them. The union may therefore believe that strike action is warranted in order to demonstrate its concern about such breaches and with an eye to preventing them in the future. It may decide to act without regard to the exact disposition of the dispute and without regard to the effect its actions may have on third parties. The Board evidently feels that such a re-

action is unwise or unfair and thus somehow invalid, but its views on these matters do not and should not make activity secondary or prohibited. Indeed in other contexts this Court has had occasion in the past to remind the Board that it does not sit as an arbiter as to the propriety of the use of economic weapons. *N.L.R.B. v. Insurance Agents' International Union, supra*, 361 U.S., at 497-498. It is clear from the Board's rationale that it has transgressed this admonition here, for the very basis of its decision appears to be that it is unfair for employees to protest the breach of their pre-existing contract rights where the employer has entered into a subsequent inconsistent arrangement with another employer which makes it impossible for him to give the union complete satisfaction.[8]

The dangers in terms of policy of the Board's present course are apparent, since any view that gives prominence to structural factors within an employer's control and beyond the union's control has the potential to change Section 8(b)(4)(B) from a provision addressed to preventing the spread of disputes from the locus the statute considers appropriate—the bargaining unit in which the employees who are complaining about their own terms and conditions of employment are employed (see pp. 4-5, *supra*)—into one which gives employers the right to arrange their affairs so as to inhibit or foreclose entirely the use of economic weapons by employees to protect their own working conditions.[9] And since contracts, including construction specifications, can always be drawn to meet their drafters' needs,

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[8] We note merely in passing that the Board's concept of fairness is at the least somewhat unusual in terms of commonly accepted notions of equity.

[9] The Board has refused to answer the question of whether the employees could put pressure on the employer with whom the Board asserts they have their "real dispute." See *I.L.A. Local 1066, (Wiggin Terminals)*, 137 NLRB 45, 48 (1962). However, in the view of one expert in the field, the answer is probably that they cannot. Lesnick, *Job Security And Secondary Boycotts: The Reach Of NLRA Sections 8(b)(4) And 8(e)*, 113 U. of Pa. L. Rev. 1000, 1038 n. 158 (1965).

including those created by the fact that their employees are organized, the Board's rationale would allow employers to shift responsibility as to any term or condition of employment (hours of work, safety requirements, manning requirements, even wages), not simply work assignments.

We therefore respectfully submit that the Court should take this opportunity to clarify the weight to be given the right of control, by ruling that all strikes by employees against their own employer over their own terms and conditions of employment are presumptively outside the scope of Section 8(b) (4) (B) and may be interdicted under it only on a showing that the union's actions or statements, other than the strike, or threat to strike, indicate a secondary intent.[10]

2. We expect that National Woodwork and the *amici* supporting it will, as they did in the lower court, attempt to argue that this is a case in which the Union was attempting to impede technological change. The facts refute this suggestion. They show that the dispute centered on which employees should have the right to fit doors (i.e., mortise them for the knobs, rout them for the hinges, and bevel them to fit between the jams) (R. 9), and at what location

[10] This does not place an undue burden on the Board. For example, in *Local 636, United Association v. N.L.R.B.*, 278 F.2d 858, 862 (D.C. Cir., 1960), the union struck its employer, who was employed by Detroit Edison on project A, on the alleged ground that he breached a work preservation clause similar to the one here. The court found, however, that the evidence showed that the real cause of the work stoppage was a dispute between Detroit Edison and the union about Edison's intention to deal with a non-union contractor at project B. Clearly, this either completely belies the existence of the avowed object or at the least shows the existence of another illegal object. In the instant case, on the other hand, the union's actions in all four instances were consistent with its avowed aim. It had no dispute with any of the owners or architects. It put no direct pressure on any of them (R. 153-154). It discussed with its own employer methods of settling the matter which were consistent with the view that it looked on the breach of contract as the critical matter (R. 26).

this task should be performed. There is no showing that the techniques for performing this operation would be different depending on how this dispute was resolved. Indeed the sparse evidence on this point in the record indicates the opposite conclusion. For Morris Green, the project manager for Fruge, testified that they "set up a shop [in a] warehouse . . . and had [a] production line there and all of these operations" were done in this manner (R. 97). The preparation of one door was accomplished in "about eight minutes" (R. 98). Since these are relatively simple operations, there is nothing in the record to lead one to believe that this production line was in any major respect different from the production line in the factory where the doors were fabricated. There will, of course, be situations where work preservation efforts will have a broader preclusive effect than they had here. There is no way, however, in which those cases could be interdicted by Section 8(e) without requiring a finding of illegality in this type of situation.

The basic issue here is thus the same as it was in *Fibreboard Paper Products Corp.* v. *N.L.R.B., supra*—whether the pressing interest of employees in practices that directly and immediately threaten their job security is to be subject to the creative and mediatory influence of joint resolution through collective bargaining, or left to fester outside it by allowing management to exercise a complete discretion in matters which so intensely affect their employees. In light of this Court's disposition of that case, and in consideration of the Board's demonstration that Congress was concerned with a different and essentially unrelated problem when it enacted Section 8(e), the conclusion that Congress intended the alternative of collective bargaining here seems clearly warranted.

Since the process chosen by Congress is one in which "the parties have wide latitude in their negotiations, un-

restricted by any governmental power to regulate the substantive solution of their differences," *N.L.R.B.* v. *Insurance Agents' International Union, supra,* 361 U.S., at 488, it is inevitable that it will produce a variety of responses to the complex and intractable problems with which it must deal, each predicated upon the social perspective of the immediate parties. Some of these responses may not further general social policy. Yet Congress decided that this is not too high a price to pay, since there is good cause to believe that collective bargaining is likely in most instances to provide the soundest method for achieving an acceptable rate of technological progress while at the same time minimizing the inevitable social costs of such change. This judgment has been borne out by experience. Certainly it is clear that collective bargaining has led to a series of imaginative and productive adjustments to the pressures generated by technological change. See Killingsworth, *Cooperative Approaches To Problems Of Technological Change,* in, Adjusting To Technological Change 61 (1963). Moreover, these accomplishments have been accompanied by a pattern of union acceptance of new techniques in all industries including the building trades, the industry involved here. See Haber and Levinson, *Labor Relations And Productivity In The Building Trades* 103-155 (1956); Mandelstamm, *The Effects Of Unions On Efficiency In The Residential Construction Industry: A Case Study,* 18 Industrial and Labor Relations Review 503 (1965), the two leading authorities on the economic effects of the activities of the building trade unions, both of which belie the suggestion that there has been widespread resistance to new techniques by these unions. Thus arguments directed to showing that bargaining has failed on occasion in the past and may fail again in the future to provide the optimum solution to the problems generated by change are simply beside the mark. For Congress expected bargaining to fail in some instances, and both experience and theory indicate

that its decision to allow collective bargaining, despite this defect, has tended to promote the public interest.

CONCLUSION

For the foregoing reasons as well as those stated by the Board, the judgment of the court below should be affirmed insofar as it affirmed the Board's order dismissing the Section 8(b)(4)(B) complaint and reversed insofar as it reversed the Board's order dismissing the Section 8(e) complaint.

Respectfully submitted,

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